

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter between

PERALTA COMMUNITY COLLEGE DISTRICT,
Employer

and

SERVICE EMPLOYEES INTL. UNION, LOCAL 790,
Employee Organization

Involving issues related to suspension,
[name redacted], Grievant

CSMCS No. ARB 00-117

ARBITRATOR'S
DECISION AND AWARD

May 1, 2001

APPEARANCES:

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BEFORE:

Bonnie G. Bogue
Arbitrator

Arbitrator's Case No. 63901-G2a

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PROCEDURAL BACKGROUND

This arbitration, involving the grievance of [name redacted], hereinafter the Grievant, arises pursuant to the agreement between the SERVICE EMPLOYEES INT'L UNION, LOCAL 790, hereinafter the Union, and the PERALTA COMMUNITY COLLEGE DISTRICT, hereinafter the District, and under which BONNIE G. BOGUE was selected as Arbitrator pursuant to procedures of the California State Mediation and Conciliation Service, and under which this award is final and binding on the parties.

An evidentiary hearing, wherein the parties availed themselves of the opportunity to call witnesses and present evidence and argument, was held in Oakland, California, on March 30, 2001. Witnesses were duly sworn. A verbatim record of the hearing was prepared, and a transcript was made available. The record was closed on March 30, 2001, oral arguments having been made on the record, in lieu of written briefs. The matter was submitted for decision on April 26, 2001, the date upon which the Arbitrator received the reporter's transcript. The parties stipulated that the matter was properly before the Arbitrator, time-lines having been met or waived. The parties further stipulated that the Arbitrator is to retain jurisdiction over the award resulting from this proceeding for purposes of resolving any dispute over implementation of the remedy, but not to reconsider the merits of this decision, which is final and binding (RT 5).

STATEMENT OF THE ISSUE

The parties stipulated at the hearing to the following statement of the issue to be determined:

Did the District have good cause to suspend the Grievant for 10 days in September of 1999? If not, what is the appropriate remedy?

SUMMARY STATEMENT OF FACTS

Following is a summary of the facts of the case. When appropriate to a particular issue, a more detailed finding of facts is included in the Discussion, below.¹

The Grievant is employed as a Clerical Assistant II at Laney College, and has held that position for about 20 years. At the relevant time period, she worked in the Disabled Students Programs and Services (hereafter DSPS) at Laney College and was supervised by [supervisor].

The Grievant was suspended for 10 days in September 1999 (JX 12). The four incidents which precipitated her suspension occurred in March, April and May of 1999. All involved an alleged failure and/or refusal by the Grievant to perform duties of her position.

On May 20, 1999, [supervisor] provided the Grievant with a Notice of Intent to Suspend her for five days (JX 11). The Notice cited the memoranda which [supervisor]

¹ Citations to the reporter's transcript are given when noting specific testimony or resolving conflicts in testimony. Testimony on general background or undisputed testimony is not referenced. Transcript references are to page (RT 152), or page and line (RT 152:9).

had issued to the Grievant regarding each of the incidents upon which the discipline was based: JX 4 (dated May 4, regarding an April 30 incident); JX 6 (May 4, regarding a May 3 incident); JX 8 (May 5, regarding a May 5 incident); JX 10, March 22, regarding a March 19 incident).

The Grievant had responded in writing on March 19 to [supervisor] regarding their interaction on that date, prior to [supervisor] issuing her memorandum about the incident (UX 1). After receiving the May 20 Notice of Intent to Suspend, the Grievant responded in writing on June 11 to each of the other three corrective memos [supervisor] had cited in the Notice. She explained her actions and/or refuted [supervisor]'s description of what had occurred in each incident (JX 5, JX 7, and JX 9). In her response to [supervisor]'s memo about the May 5 incident, the Grievant noted that supervising student employees, computer operator and word processor duties were not within her job description, and stated that she was willing to perform these duties but was entitled to compensation for working out of classification. (JX 9)

A pre-disciplinary hearing was held June 24 by Vice Chancellor [name redacted], in which the Grievant was provided the opportunity to respond to the charges on which the proposed five-day suspension was based. On August 12, 1999, he issued a Notice of Suspension, in which he increased the suspension to ten days from the five days stated in the May 20 Notice of Intent to Suspend. (JX 12)

The Grievant had requested, prior to these incidents, an audit of her position, on the basis that the duties for her particular position of Clerical Assistant II in DSPS

(reflected in the job announcement, JX 2, and in the duties required by her supervisor) did not comply with the description for the Clerical Assistant classification series (JX 3). Following a internal desk audit of her position, her request for a reclassification or change in her duties was denied on the ground that the duties were appropriate and her job description was appropriate (RT 23-24). She then requested that an outside audit be conducted. On March 12, 1999, she reminded the Vice Chancellor of her request for the selection of three outside auditors. (UX 2) At the time of her suspension, no outside audit had been conducted.

POSITION OF THE DISTRICT

The District has good cause to suspend the Grievant. She admitted that she failed and refused in these instances to carry out duties that were included in her job description, and she has stated that she will refuse to do so until there is resolution to the issue about whether her job description is proper or she receives out-of-class pay. [supervisor]'s version of the events should be credited, as there is no reason for her to have written up these incidents had the Grievant not failed or refused to do the duties assigned to her. The Grievant had the obligation to follow her existing job description until some change had been made. The classification series description (JX 3) requires Clerical Assistants to perform related work as required; there is no limiting language that would excuse her failure to perform duties within the description for her position.

The suspension is justified for her repeated failure and refusal to perform assigned duties. The decision to increase the suspension from the proposed five days

to ten days is valid. The increase had to do with the Grievant's responses to the Vice Chancellor in the pre-implementation hearing. The same grounds and the same reasoning were relied on as were noted in the notice of intent to suspend.

POSITION OF THE UNION

The Grievant exercised her contractual right to request a n audit to determine whether she should be paid for out-of-class work; however, she followed her Union's advice and performed assigned duties while her audit request was pending. Her memo requesting out-of-class pay was not a refusal to do the duties unless she was paid additional compensation. The only time she did not do all of the work within her job description was when she could not get to the task because of multiple functions of her job. She testified that she performed all of the tasks and reasonably responded to her supervisor's directions.

The Vice Chancellor increased the discipline from the five days he originally proposed to 10 days, which is invalid, and also reflects that the suspension decision was poorly investigated. The suspension should be reversed.

DISCUSSION

To meet the burden of establishing good cause for the Grievant's suspension, the District must satisfy two areas of inquiry. The first relates to the conduct on which the discipline is based, including whether the Grievant understood what duties she was required to perform, whether the evidence supports the District's allegation that she

refused or knowingly failed to perform those duties, and whether any mitigating circumstances justified her failure or refusal to perform those duties. If that standard is satisfied, the second area of inquiry relates to the level of discipline, that is, whether a suspension was justified by the misconduct that has been proven, whether principles of progressive discipline were applied, and whether the increase from five to ten days was a valid.

There were four incidents that formed the basis for the suspension. The interpretations of the Grievant and her supervisor, [named redacted], differ as to each of those events although there is little dispute as to the facts.

The first event occurred March 19, 1999, and involved the Grievant's conduct at a time when a new computer desk was being assembled in her work space. She testified that she refused to work in the space because the pieces of the desk on the floor made the area unsafe to be working in (RT 78 et seq). Therefore, she was sitting at the receptionist desk. [supervisor] stated that she found the Grievant eating, watching a personal TV set, and working on personal things and not performing any work duties. She testified that when she told the Grievant to use this time to label file cabinets, the Grievant refused.

On the day of this incident, the Grievant had written a memo to [supervisor], protesting [supervisor]'s conduct toward her and explaining that her reason for refusing to work at her own desk was because of the hazardous conditions. She explained her refusal to follow [supervisor]'s directive to make the file cabinet labels: "As I explained to

you[,] we rarely use these files and due to the conditions I would rather not do this at this time. This seem[s] to make you angry [sic] as you start rising [sic] your voice at me saying if you didn't want to do it why didn't you say so. I feel this was not professional and uncalled for.” (UX 1) This prompted [supervisor]’s memo of March 22, which detailed the interaction on March 19 and noted that, after she had herself obtained the labels because the Grievant had refused to walk through the cluttered area to get them, the Grievant still said it was a “bad time” to do the job and turned her back on her, which prompted [supervisor] to raise her voice. [supervisor] concluded that the Grievant had been “both uncooperative and rude.” (JX 10) The Grievant did not make the labels as directed by [supervisor] and there is no evidence of any hazard or safety risk, had she performed that task as instructed. She denied in her testimony that [supervisor] had brought the labels to her to fill out. (RT 100)

The evidence supports the District’s contention that the Grievant refused a clear and reasonable directive from her supervisor to perform a task that was within her job description and at a time when she had no other work to do. [supervisor]’s testimony is credible that she had accommodated the Grievant’s safety concerns by obtaining the labels for her so that she did not have to walk through the area she perceived as hazardous in order to get them. Yet the Grievant still failed to make the file labels as directed by her supervisor and instead chose to chastise her supervisor for raising her voice.

The next incident occurred on April 30, and involved the alleged refusal of the Grievant to send out survey responses for the High Tech Center.

[Supervisor] testified she was aware the Grievant had refused to do the task because a High Tech Center instructor told her that she had refused. (RT 56-58) [Supervisor] testified, and stated in her memo to the Grievant dated May 4 (JX 4), that the Grievant told [supervisor] she had refused to do this task because providing clerical assistance to the High Tech Center was not part of her job responsibilities and that someone from the High Tech Center should do it. [Supervisor] testified that, after she told her the task was her responsibility, the Grievant then had a student do the job when [supervisor] had suggested that students were available to assist her. (RT 28-33, 61)

The Grievant testified, and also said in her June 11 written response to [supervisor]'s counseling memo (JX 5), that she had not refused to mail the survey results, but rather that she was doing another task of higher priority that had to be completed by the next day, so she merely said she could not do the survey job then and suggested the High Tech Center do it themselves. (RT 84, 102) She said [supervisor] had responded that she must do it "now." She said it was her own idea to give the survey job to a student and that the task was finished that day. (JX 5) She testified that she functioned as [supervisor]'s secretary and that jobs that came from other units or staff within DSPS were to come through [supervisor], not as direct work requests from other staff members. (RT 76-77, 97, et seq.)

[Supervisor] rejected the Grievant's claim that she did not know she was to do work for the High Tech Center, since that is a unit within DSPS and her job is to provide clerical services to DSPS. She also rejected the Grievant's claim that she only would do tasks requested by other staff if they got [supervisor]'s approval. In her counseling

memo, [supervisor] stated that the Grievant was to come to [supervisor] about work assignments only if she had work she believed to be of a higher priority and needed direction on which task to do first. She testified that she did not understand the Grievant to be asking about priorities on April 30, but rather was refusing to do the task because it was a High Tech Center job that she did not consider to be within her job description.(RT 60-61)

This evidence supports the District's contention that the Grievant inappropriately refused to do a task within her job duties, as defined in her job description. The evidence shows that she initially refused to do the job because it was requested by the High Tech Center instructor and then she argued with [supervisor] when she expressly directed her to do the task, prompting [supervisor] to tell the Grievant that she had to do work for the Tech Center and she wanted the job done "now." While some of the Grievant's resistance may have been justified by the difficulty in setting priorities and the time pressure to complete the job she was doing at the time, the evidence nonetheless is clear that she refused the instructor's work request because she did not think it was part of her job unless the request "came through" [supervisor] (RT 76). [supervisor] was credible when she testified that the Grievant was not limited to tasks that [supervisor] had personally assigned and that the Grievant had reason to know work from the High Tech Center was part of her responsibilities because she had previously been told by [supervisor] that she was to provide clerical services to all of DSPS, not just to [supervisor] (RT 59). After [supervisor]'s express directive that day, the Grievant did complete the job by delegating it to a student (RT 84-85). But by her own admission that

option was known to her at the time she initially refused the instructor's request a couple of days earlier, which defeats her defense that her refusal was only because she was too busy with a higher priority task.

Therefore, [supervisor] was justified in issuing the counseling memo regarding the April 30 incident, stating that the Grievant had refused to send out the survey responses and confirming their discussion about her job duties. The memo warned the Grievant that "insubordination" could result in disciplinary action. (JX 4)

The third incident occurred a few days later on May 3 and involved the Grievant's alleged refusal to drive a shuttle cart from where it was inappropriately parked at the student center rather than being returned to DSPS. [Supervisor] stated, in a counseling memo dated May 4, that when the student assistant who was scheduled to drive the cart phoned in that she would be absent, the Grievant informed the Staff Assistant to arrange to have the cart picked up, rather than going to get the cart herself. (JX 6).

[Supervisor] testified that she wrote the May 4 counseling memo because it was the Grievant's responsibility to drive the shuttle cart, as expressly stated in her job description, and it was not the staff assistant's duty. She said the staff assistant told she had done it because the Grievant told her to go pick up the cart. Also, [supervisor] said the Grievant had no supervisory authority to assign the task to the staff assistant, but rather was supposed to pick up the cart herself. (RT 34-35)

The Grievant responded in writing on June 11 that she had acted appropriately when she reported the student driver's absence to [supervisor] and the staff assistant,

and that she had not refused to perform her job duty. (JX 7) Nothing in the Grievant's testimony refutes [supervisor]'s version of the facts. She did not say that she drove the cart herself and had no explanation how the cart was returned other than by the staff assistant (RT 83). Her explanation was that, since no one asked her to pick up the cart, she did not think it was her duty to pick it up; rather she thought it was her duty to report to the staff assistant the "misconduct" (a driver's error in leaving the cart at the student center). (RT 93) She also testified that, in general, she was not supposed to leave her desk to drive shuttle carts unless there was someone else available to act as receptionist.

While this evidence does not show that the Grievant "refused" a direct order from her supervisor to drive the cart, it does support the District's charge that she failed to perform a duty that she knew was within her job responsibility and had performed on other occasions. Rather than picking up the cart herself, or making arrangements to have someone cover the reception desk while she went to get the cart, she instead passed the problem on to the staff assistant, whose job did not include driving shuttle carts. While the Grievant had objected to shuttle cart driving being part of her job duties (discussed below), it remained an expressly stated duty within her job description. The Grievant acknowledged that she understood it was her job duty to drive carts when needed.

Therefore, [supervisor] acted reasonably in issuing the counseling memo (JX 6) which reminded the Grievant that her responsibilities included driving the carts herself when a scheduled driver was not available. The memo advised her that refusal to

perform her job duty, such as had occurred on May 3, was unacceptable and could result in disciplinary action.

The final incident giving rise to the suspension was a conversation between [supervisor] and the Grievant on May 5, which [supervisor] memorialized in a memo dated May 5 (JX 8). The memo asserted that the Grievant had said she would no longer give student employees directions or supervise their work. The memo reminded the Grievant that these duties are part of her job description and that failure to perform them is insubordination which could result in discipline.

The Grievant responded in June 11 memo (JX 9), in which the Grievant stated that she was “willing to perform all of my job duties” and that while she was willing to work out-of-classification, she was entitled to be compensated for out-of-class work. She asserted that Senior Clericals supervise students, whereas Clerical Assistant II’s do not. She also asserted that “driving is not a clerical duty on any level,” including Clerical Assistant II. Also, she contended that the Clerical Assistant II position is not a computer operator nor a word processor. She concluded: “I am willing to do any of the above listed assignments. However, per my union contract with Peralta College District, Section 10.7, I am entitled to compensation for working out of classification. I have never been offered any compensation.”

[Supervisor] testified that she interpreted this memo from the Grievant to be a reiteration of her prior verbal statements that she would refuse to supervise student

employees, drive carts or perform certain computer-related duties unless she was paid out-of-class pay.

The Grievant testified that she had been advised by her Union representative that she could not refuse to do the work, but must perform the duties until her job description was changed; therefore, she said she had never refused to do the jobs, although she thought she should be paid for performing duties that did not fit the class specifications. She testified that she had never received the outside audit that she had requested, which would have resolved her claim that the description for her specific position and some of the duties contained therein, including supervising students and driving carts (JX 2), did not comply with the specifications for the Clerical Assistant II classification (JX 3).

The evidence does not show that the Grievant ever actually refused to perform the duties she claimed were outside of the class specifications unless she received out-of-class pay, either before or after the May 5 counseling memo. However, the evidence does show a repeated pattern of conduct by the Grievant of objecting to, or resisting the performance of, duties within her job description, and that behavior required [supervisor] to insist on several occasions that she perform such duties, over the Grievant's objection. The Grievant's argument or discussion on May 5 with [supervisor] about student supervision followed only a couple of days after the counseling about her not driving the cart. From this May 5 discussion, [supervisor] clearly understood that the Grievant was threatening not to perform duties that she thought were wrongfully included in her job description, or that she would not perform them unless she was

promised out-of-class pay. The Grievant's response, written over a month later, backed off of the refusal to perform the duties, but reiterated her demand that she receive out-of-class pay for performing those duties.

The District has met its burden of proving that the events occurred as described in the various counseling memos, and that the Grievant knew or had reason to know that all of the disputed duties were within her job requirements as Clerical Assistant II in DSPS, as spelled out in her job description (JX 2). The decision to impose the suspension was based on this series of disputes over a period of a couple of months, all relating to the Grievant's failure to perform, refusal to perform, and resistance to job duties.

A possible mitigating factor is the Grievant's ongoing disagreement with the District about whether her job was properly classified. The Grievant's conduct on the latter two incidents was clearly colored by her opinion that, despite the outcome of the desk audit, some of her duties (driving, supervising student employees, computer work) were not appropriate to her classification of Clerical Assistant II. She was disgruntled, and reasonably so, by the fact that the District had never responded to her request for an outside audit after the initial internal audit had rejected her claim.

However, while the Grievant had a right to press for a second audit, and had a right to request out-of-class pay and have that request evaluated in light of her job description, her resort to "self help" by refusing, failing or threatening not to perform the duties of her position, was not an appropriate means of pressing her claim. The District

had granted her an initial desk audit, which found all of her duties were appropriate to her classification. It's delay in implementing an outside audit is not a mitigating factor sufficient to excuse her conduct in failing or threatening not to perform, or resisting her supervisor's instructions to perform, duties legitimately assigned under her verified job description.

The second area of inquiry is whether this proven conduct warrants the 10-day suspension.

Article 22 of the collective bargaining agreement reflects the well-established employment principle that, under the "good cause" or "just cause" standard, progressive discipline should be utilized unless the nature of the misconduct justifies an immediate imposition of a higher level of discipline. Sec. 22.2 does not require that a formal "warning" precede a suspension. In this case, although no formal warning was issued, each of the counseling memos warned the Grievant that continued failure or refusal to perform job duties could be grounds for further discipline. [supervisor] also counseled the Grievant orally, before issuing each memo. The Grievant continued similar conduct after receiving these counselings and warnings. Therefore, the District has complied with progressive discipline principle when it decided a suspension was warranted by her continuing conduct of failing to perform, refusing to perform or resisting or threatening not to perform her job duties.

The final question is whether the increase of the suspension to 10 days, from the five days proposed prior to the "Skelly" pre-disciplinary hearing, is valid.

The Vice Chancellor issued the initial notice of the five-day suspension, based on the evidence contained in the four corrective memos. Those memos and surrounding circumstances were cited in the Notice of Intent to Suspend for five days and were the subject of the pre-disciplinary hearing. Those same factors remained the sole basis for the 10-day suspension. Nothing in his final suspension notice explains any additional factor that would have caused him to double the length of the suspension. The Vice Chancellor did not appear as a witness, and the sole District witness, [supervisor], testified that she had no discussion with him about his reasoning for the length of the suspension. The District contends that the increase in penalty obviously was caused by the Grievant's conduct in the pre-disciplinary hearing. That contention could only be supported by reading an implication into the first sentence of the final notice of suspension, which reads: "After careful consideration of your statements in the pre-implementation hearing...I have decided to suspend you without pay for ten (10) work days...." However, that statement on its face merely reflects the Vice Chancellor's obligation to give "careful consideration" any statements the Grievant made in this due process hearing, and does not constitute evidence that her statements warranted an increase in the length of the suspension.

Without any evidence of further inappropriate conduct by the Grievant that was discovered during the pre-disciplinary hearing, or any evidence of her conduct in the hearing that would in itself warrant discipline, the increase of the suspension from 5 to 10 days appears arbitrary and capricious. Without any evidence justifying the increase,

or any rationale in the letter itself, the action appears to be a penalty imposed on the Grievant for exercising her due process right to respond to the charges against her.

For these reasons, the increase in the length of the suspension from that proposed prior to the pre-disciplinary hearing was invalid. A five-day suspension is justified by the evidence offered in this arbitration, which was the same evidence available to the Vice Chancellor prior to the initial notice of intent to dismiss, which he had deemed sufficient to justify a five-day suspension.

AWARD

The District had good cause to suspend the Grievant for five days. The 10-day suspension that was imposed in September 1999 is to be reduced to five days and Grievant is to be made whole for five days of compensation.

By stipulation of the parties, the undersigned Arbitrator retains jurisdiction over this Award to resolve any disputes that may arise over implementation of the remedy ordered herein, but not to reconsider the merits of this decision, which is final and binding. Jurisdiction is retained until August 31, 2001, but that period may be extended at the request of either party based on showing of cause for such an extension.

Date: _____
Bonnie G. Bogue
Arbitrator